United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Docket No. 74-2002

IN THE

United States Court of Appeals

For the Second Circuit

ELGI HOLDING, INC.,

Plaintiff-Appellant,

—*vs.*—

INSURANCE COMPANY OF NORTH AMERICA,

Defendant-Appellee.

Appeal from Order Denying Motion for A New Trial

APPELLEE'S BRIEF

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TABLE OF CONTENTS

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ARGUMENT

POINT I

THE APPEAL SHOULD BE DISMISSED FOR FAILURE TO DESIGNATE, PRINT OR CITE ANY PORTION OF THE RECORD OR TO OTHERWISE ESTABLISH A BASIS FOR GRANTING A NEW TRIAL.

The record on appeal in this case absent the transcript was forwarded by the Clerk of the District Court on August 15, 1974 and completed by forwarding the transcript on October 4, 1974. At no time has plaintiff designated the parts of the record which he intended to include in the appendix or the exhibits necessary for the determination of the appeal as required by Rules 11 and 30 of the Federal Rules of Appellate Procedure and Rule 11 of this Court. The entire appendix, which was filed with

plaintiff's brief on November 29, consists of Judge Curtin's order covering less than two pages which denied plaintiff's motions for judgment n.o.v. and for a new trial.

On this state of affairs, it is virtually impossible to decide the points urged by plaintiff on appeal. Plaintiff's brief includes no citation to the record or to any exhibit.

Notwithstanding the express provision of paragraph (e) of Rule 11 of this Court which requires the reproduction in the appendix of those exhibits to which appellant "wishes to direct the particular attention of the court", none appear. Nor does a single portion of the transcript so appear to support plaintiff's bald assertion that the verdict is unsupported by the evidence.

This Court is left with one typewritten copy of the transcript to do appellant's counsel's work for him - to try to find the error in the record. Counsel for appellant, not the Court, is charged with the search of the record for evidence of error by the Court below. Where the principal alleged error lies in the failure of the entire record to support the jury verdict, it is particularly inappropriate to demand that the Court undertake such a task.

If the merits of the appeal in a two hundred thousand dollar case prompt trial counsel to no greater effort on his own behalf, it is not incumbent upon the Court to try to find the error for him.

This Court has lead the way in expediting appeals. The presentation of essential facts necessary for a prompt and fair determination of an appeal requires in turn a full and

fair compliance with Appellate rules. Where the Court is left without specification of the necessary facts, the appeal should be dismissed. Walters v. Shari Music Publishing Corporation, 298 F.2d 206 (2nd Cir. 1962); Lockhart v. Hoenstine, 411 F.2d 455 (3rd Cir. 1969); Carroll v. Andrews, 438 F.2d 1221 (5th Cir. 1971).

The burden which appellant imposes on the Court is of course a similar burden imposed upon respondent. The remainder of this brief is an attempt to assume that burden as effectively as possible under the circumstances.

POINT II

THERE WAS NO CLEAR ABUSE OF DISCRETION BY THE TRIAL COURT IN DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL.

a) The Factual Basis for the Verdict

The facts favorable to the defendant amply support the jury's verdict in defendant's favor. The fire unquestionably was intentionally set. The Buffalo Fire Department's chief investigator, Mr. Fitch, who arrived at the scene of the fire while it was in progress found that "...the fire was not accidental and the human element was involved..." (Def. Ex. 11) He fixed the point of origin in a rear office with an "...almost immediate flame extension from one end of the warehouse to the other..." (Def. Ex. 11) Defendant's expert reached the same conclusion from his first hand observation of the burn patterns which traced the path of the fire (Transcript pp. 496 et seq.

and 506-508). Each witness prepared his report entirely independent of the other (Transcript p. 577). Each reached the same conclusion as to both the incendiary origin of the fire and the exact place of its origin.

Nor can plaintiff's involvement be seriously questioned. Four days before the fire, he insisted on a binder to protect him from loss of rents in the event of fire (Def. Ex. 10). His testimony on this important document (Transcript p. 216) was flatly contradicted by the secretary who prepared the binder, Miss Russo (Transcript pp. 594, 595) her employer, Mr. Cutting (Transcript p. 614) and the bank officer who managed the overdue mortgage account, Mr. Butler (Transcript p. 751). The trial judge expressly found that "...the jury was entitled to conclude that he (the plaintiff) testified falsely in regard to material matters." (Appellant's Brief A-2) In ordinary language he lied and several different witnesses, each excluded from the court room while the others testified, proved it.

In other respects, plaintiff's testimony was also provably false. He began his testimony with a claim of great wealth - a 50% owner in a multimillion dollar business (Transcript pp. 36, 358) with a line of credit of two to three hundred thousand dollars (Transcript p. 39). The bank statements (which he attempted unsuccessfully to deny receiving) showed that the line of credit was in reality a line of rubber checks (Def. Ex. 13; Transcript pp. 722, 723).

Plaintiff's testimony on when he was last at the premises (Transcript p. 274) and his association with Rocco Vaccaro (Transcript p. 200 et seq.) at the time became hopelessly confusing and contradictory (Transcript pp. 193-208). He did not know the name of the man whose promissory notes he held. He claimed that when he gave contrary testimony at his deposition he "...was under medication. I was very much confused." (Transcript pp. 209, 213)

The fact is that he became confused in attempting to deny his presence at the premises the Friday or Saturday before the midnight Saturday fire (1:39 a.m. Sunday Def. Ex. 11). The fact is that foreclosure was threatened and extra insurance was taken out just prior to the fire (Def. Ex. 5 and 10). Plaintiff lied because he had to lie to extricate himself from responsibility for the fire.

The trial judge did not abuse his discretion in denying plaintiff's motion for a new trial. On the contrary, the record taken as a whole (which plaintiff on appeal chooses not to do) shows the trial judge exercised his discretion wisely in letting the jury's verdict stand. Diapulse Corporation of America v. Birtcher Corporation, 362 F.2d 736, 744 (2nd Cir. 1966).

Manifestly these facts were sufficient to sustain the verdict; Boone v. Royal Indemnity Company, 460 F.2d 26 (10th Cir. 1972); Esquire Restaurant, Inc. v. Commonwealth Ins. Co. of N.Y., 393 F.2d 111 (7th Cir. 1968).

The cases cited by plaintiff offer little comfort to the appeal. In Pacific National Fire Insurance Company v. Mickelson, 235 F.2d 425, 427 (8th Cir. 1956) the jury verdict for plaintiff was sustained. The Court held "...that circumstantial evidence, including evidence of motive and opportunity ...are sufficient to justify sustaining, on appeal, the ultimate conclusion of the fact-finding agency." Defendant agrees. The jury's view of circumstantial evidence in this case should likewise be sustained.

To the same effect is the case of Hanover Fire Insurance Company of New York v. Argo, 251 F.2d 80, 82 (5th Cir. 1957), where the court said that if the jury had found for the insurance company the verdict "...would have been unassailable indicating motive and opportunity..." Other cases cited by plaintiff also support defendant's position or were decided upon grossly dissimilar facts. No case supports plaintiff's position here - that a jury verdict for the defendant should be set aside and a new trial ordered.

b) Evidence of Plaintiff's Continuing Indebtedness

The remaining questions on the admissibility of evidence are equally without merit. Plaintiff claimed that he was and continued to be a man of great wealth. The evidence of debts after the fire bore squarely upon his credibility. It was properly admitted for that purpose (Transcript p. 775).

c) Reference to the Laboratory Analysis by Defendant's Expert

Plaintiff's position with respect to the results of the laboratory tests referred to by defendant's expert witness is also unfounded. First, the report was marked for identification (Transcript pp. 466, 473, 493) and was not in fact admitted as claimed by plaintiff (Appellant's Brief p. 8). The results of the tests referred to by defendant's expert went to the weight of his expert testimony not its admissibility as the Court correctly ruled (Transcript p. 493).

d) The Court Did Not Prevent Proof by Plaintiff's Expert

The testimony of plaintiff's expert was not improperly or unfairly curbed. In fact, plaintiff's direct examination was completed well within the allotted time without objection by defendant or interruption by the Court (Transcript pp. 799-804). No objection was made or indication given that plaintiff wished to pursue the matter further (Transcript p. 808). Plaintiff called the next rebuttal witness and matters were completed at 4:57 p.m. The transcript, which plaintiff completely ignores, offers no support for plaintiff's claim that "...the Court's interference with the right of the plaintiff to present relevant and important testimony..." prejudiced the plaintiff. (Appellant's Brief p. 9) At best this claim accomplishes little but to illustrate the vice of urging error without reference to the record.

It is hardly conceivable that a different ruling on any of these evidentiary points even if improper could have affected

the result. The Court was clearly right and acted within its discretion in not granting a new trial on these evidentiary grounds. Helene Curtis Industries v. Sales Affiliates, 233 Fed. 2d 148, 166 (2nd Cir. 1955).

CONCLUSION

The trial court did not clearly abuse its discretion but acted wisely in denying plaintiff's motion for a new trial. The fire was unquestionably of incendiary origin. Plaintiff, the owner who maintained an office at the premises, was in dire financial circumstances. He had received notice of foreclosure proceedings and taken out additional fire insurance a few days before the midnight fire.

The trial court found that the jury was entitled to conclude that plaintiff had testified falsely on these and other material matters. Plaintiff's arguments which are not supported by any citation to the record form no basis for setting aside the judgment of the trial court.

The appeal cites no basis whatsoever in the record and should be dismissed as totally without merit.

Dated: December 30, 1974

Respectfully submitted,

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Everett J. Rea

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cc: Ohlin, Damon, Morey, Sawyer & Moot

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